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Supreme Court, U.S.
FILED

No. _____ 951425 MAR - 6 1996

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In The

Supreme Court of the United States

October Term, 1995

LUCIOUS ABRAMS, JR., REV. G. L. AVERY, WILLIAM GARY CHAMBERS, SR., and KAREN WATSON,

Appellants,

v.

DAVIDA JOHNSON, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia (Three Judge Court)

JURISDICTIONAL STATEMENT AND APPENDIX

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86 pp

QUESTIONS PRESENTED

1. Whether the district court, in drawing a remedial congressional redistricting plan, erred in disregarding the state's legislative policy choices and making changes that were not minimally necessary to cure the constitutional defects found in the existing plan?

2. Whether the court ordered plan, which fragmented the black population in two majority black districts and dispersed it throughout the state, thereby reducing the number of majority black districts from three to one, is retrogressive and/or dilutes black voting strength in violation of Sections 2 and 5 of the Voting Rights Act?

3. Whether the court erred in refusing to grant appellants an evidentiary hearing to provide them an opportunity to challenge the court's plan?

4. Whether the court ordered plan, which contains unnecessary population deviations, complies with the one person, one vote standard of Article I, Section 2 of the Constitution?

5. Whether the court erred in denying private intervention to defend the constitutionality of the Second Congressional District given the failure of the state defendants and the United States to appeal the court's finding that the Second District was unconstitutional?

PARTIES TO THE PROCEEDING

The appellants are Lucious Abrams, Jr., Rev. G. L. Avery, William Gary Chambers, Sr., and Karen Watson. The appellees are Davida Johnson, Pam Burke, Henry Zittrouer, George L. DeLoach, and George Seaton. The defendants below were Zell Miller, Governor of Georgia, Pierre Howard, Lieutenant Governor of Georgia, Thomas Murphy, Speaker of the House of Representatives of Georgia, and Max Cleland, Secretary of State of Georgia. Max Cleland has been succeeded as Secretary of State by Lewis Massey. The United States of America was a defendant intervenor.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The December 13, 1995 opinion of the three judge court for the Southern District of Georgia implementing a court ordered redistricting plan for Georgia's congressional districts is unreported and appears in the appendix hereto, App. 1. The August 22, 1995 order of the district court denying intervention to defend the constitutionality of Georgia's Second Congressional District is unreported and appears in the appendix hereto, App. 42. The January 8, 1996 order of the district court denying appellants' motion for a hearing and reconsideration is unreported and appears in the appendix hereto, App. 44.

JURISDICTION

The opinion and order of the three judge court for the Southern District of Georgia was entered on December 13, 1995. Appellants filed their notice of appeal on January 11, 1996. *See* App. 46.

This appeal is being docketed in this Court within 60 days after the filing of the notice of appeal in the district court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in the case are Article I, Section 2 of the Constitution of

the United States, and Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973 and 1973c, the pertinent texts of which are set out in the appendix hereto, App. 49-52.

STATEMENT OF THE CASE

Appellants, who were defendant intervenors below ("Abrams intervenors"), are a group of black and white registered voters and residents of Georgia's Eleventh Congressional District. Appellees, plaintiffs below, are white residents of Georgia who challenged the state's 1990 congressional redistricting on constitutional grounds. The defendants below were Zell Miller, Governor of Georgia, Pierre Howard, Lieutenant Governor of Georgia, Thomas Murphy, Speaker of the House of Representatives of Georgia, and Max Cleland, Secretary of State of Georgia. The United States of America was also a defendant intervenor.

In *Miller v. Johnson*, 115 S.Ct. 2475 (1995), this Court held that Georgia's Eleventh Congressional District was unconstitutional because the state, absent a compelling reason for doing so, had relied upon race as a predominant factor in redistricting in substantial disregard of customary and traditional districting practices. On remand, the three judge court allowed the plaintiffs to amend their complaint to challenge the constitutionality of the state's majority black Second Congressional District. In making its ruling the court refused to allow appellants to defend the constitutionality of the Second

District or to allow any further intervention by private parties.[1]

Following a trial the three judge court declared the Second District unconstitutional. App. 1-2.[2] The court provided the legislature an opportunity to adopt a congressional redistricting plan curing the constitutional defects in the Eleventh and Second Districts but on September 13, 1995 the defendants notified the district court that the legislature was deadlocked and had adjourned. App. 2.

The district court held a hearing at which it allowed the parties and various *amici* an opportunity to present proposed remedial plans. Prior to the hearing the court entered two orders. The first instructed the parties to submit "a plan that makes the least changes, in terms of line drawing, in Georgia's present congressional plan but

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[1] The court ruled that "[t]he Abrams intervenors will not participate . . . in the evidentiary proceedings on the matter of the constitutionality of the Second Congressional District of Georgia. It is our view that there is no need for intervenors in this litigation. The record is that the State of Georgia and its elected officials will defend the congressional districts that were enacted by the legislature to the full extent of the law. We have seen that and we expect that they will do that again and therefore we see no need to have intervenors." App. 42-3.

[2] None of the state defendants appealed the ruling that the Second Congressional District is unconstitutional, a position that the state defendants barely contested during the remand proceedings. As they themselves pointed out, "the State Defendants presented no witnesses and asked no questions of other witnesses at the liability hearing." Response of Defendants Miller, Howard and Cleland to 'Plaintiffs' Second Interim Petition for Fees and Expenses,' p. 5.

at the same time brings the Eleventh and the Second Congressional Districts . . . into compliance with the United States Constitution." Order, October 17, 1995, pp. 2-3. The second order directed the parties to "further submit a plan based on the first plan that Georgia submitted to the Department of Justice [following the 1990 census] for preclearance." Order, October 20, 1995, p. 1.

State defendants Miller, Howard, and Cleland refused to submit plans, advising the court that:

> the Defendants do not know what the Constitution now requires in terms of remedy. They do not have a view of what plan might satisfy the particular criteria set forth in the Court's orders. For that reason, they are unable to submit what the Court directs.

Submission of Defendants Miller, Cleland and Howard in Connection with the Issue of Remedy, p. 2. Appellants, the United States, and *amici* incumbent members of Congress (including Representatives John Lewis and Newt Gingrich) submitted least-change plans as directed by the court. App. 22 n.16.

The district court issued its plan on December 13, 1995 (Judge Edmondson dissenting). The court, in its own words, proceeded as if the state had adopted "no plans." App. 7. According to the court,

> Georgia's current congressional plan cannot form the basis for the remedy we now construct because it does not represent the goals of Georgia's historic policies nor the state legislature's true intent.

App. 4. *Also see* App. 5 ("we cannot use Georgia's current plan as a surrogate for the legislature's reapportionment policies and goals"), App. 6 ("we are unable to use Georgia's current plan as the basis for a remedy"), App. 7 ("the Court's task is akin to those cases in which states had no plans").

The district court was of the view that no deference was due the existing plan because it was the product of the "Department of Justice's [i]nterference." App. 4. The court said that "DOJ basically used the preclearance process to force Georgia to adopt the ACLU redistricting plan and, in the process, subvert its own legislative preferences to those of the DOJ." App. 5. Accordingly, the court was "not bound by *Upham* to make only minimal changes to the current plan in fashioning a remedy." App. 5-6. Adopting a remedy that would be "minimally disruptive to Georgia's current plan was not an option." App. 29. Any remedy "would necessarily have resulted in drastic changes." App. 6.

The court's plan eliminated two of the three majority black districts in the existing plan, reducing the black voting age population (VAP) in the Second District from 52.3% to 35.1%, and in the Eleventh from 60.4% to 10.8%. *Johnson v. Miller*, 864 F.Supp. 1354, 1366 n.12 (S.D.Ga. 1994), *aff'd sub nom. Miller v. Johnson*, *supra*; App. 39.[3] The court's plan also represented a "drastic change[ ]" from the first plan enacted by the general assembly prior to any involvement by the Department of Justice, which

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[3] The black VAP in the remaining majority black district, the Fifth, was increased from 53% to 57.2%. App. 16.

contained two majority black districts, the Fifth and the Eleventh. Under the state's original plan, the Fifth District was located in the metropolitan Atlanta area, and the Eleventh ran from DeKalb County to the southeast. *Miller v. Johnson, supra,* 115 S.Ct. at 2483.

The district court refused to draw a second majority black district because in its view "Georgia's minority population is not geographically compact." App. 22. The court conceded, however, that:

> If Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the Court would have included one since Georgia's legislature probably would have done so.

App. 22 n.16.

The court did hold that "Section 2 of the VRA required the Court to maintain the Fifth District as a majority-minority district." App. 18. Because of racial bloc voting, a district containing "the percentage of black registered voters as close to fifty-five percent as possible was necessary . . . to avoid dilution of the Fifth District minorities' rights." App. 26.

The plan adopted by the court thus preserves the Fifth District as a majority-minority district. At the same time, however, the black population in the Second and Eleventh Districts was dispersed throughout the state into other districts. The black VAP was increased in the First District from 20.3% to 27.7%, in the Third from 16.3% to 22.5%, in the Fourth from 10.8% to 32%, in the Eighth from 18.4% to 28.3%, and in the Tenth from 16.5%

to 34.5%. *Miller v. Johnson,* No. 94-631 (S.Ct.), Joint Appendix, p. 20; App. 39.

Furthermore, the court relocated the Eleventh District and put it "in the Northeast Atlanta corridor" where it would have an "urban/suburban flavor," App. 13-4, and be "a 'radius' district reaching from suburban Atlanta to the state line." App. 14. The justification for the relocation was that this was an area "where future growth is anticipated." App. 13. The Eleventh District was also configured around "Interstate Eighty-Five as a very real connecting cable." App. 14.

The court substantially reconfigured the Third, Eighth, and Tenth Districts, as well. Under the prior plan the Third District was located essentially in the center of the state. *Miller v. Johnson,* No. 94-631 (S.Ct.), Joint Appendix, p. 51. The court's plan moved it to the western edge of the state. App. 41. The new Tenth District was drawn south to fill the void left by moving the Eleventh to the northeast Atlanta corridor. *Id.* Under the court's plan the Eighth District runs from the Florida line north to metropolitan Bibb County and thence further north to the suburbs of Atlanta, including in a single district the metropolitan hub counties of Lamar, Upson, and Monroe with the rural, south Georgia counties of Echols, Clinch, and Charlton. *Id.*

The court's plan moved a total of 2,020,820 people – 31.2% of the state's population – into new congressional districts. Abrams Intervenors' Motion for Hearing and for Reconsideration, Declaration of Linda Meggers. By contrast, one of appellants' proposed least-change plans moved only 784,531 people into new districts, or 12.1% of

the population of the state. Abrams Intervenors' Memorandum in Response to Submission of Additional Demographic Evidence by Defendants Miller, Howard & Cleland, November 27, 1995 letter from Linda Meggers.

In devising its plan, the court explicitly "subordinated" protection of incumbents "to other considerations." App. 18. It moved the incumbent in the Eleventh District to the Fourth District, the incumbent in the Second District to the Third District, and the incumbent in the Eighth District to the Second District. The effect of these changes is to create potential contests between incumbents in Districts Three and Four. App. 18-9. Two of the three dislocated incumbents were black, and only these two were placed in new districts with other incumbents.

Finally, the court's plan contained a total deviation among districts of 0.35%, App. 39, although the Department of Justice prepared a proposed remedial plan with a deviation of only 0.19%. United States' Response to Plaintiffs' Plans Remedy 4X and 4X-R. The district court justified the deviation in its plan by deferring to the state's preference "for not splitting counties outside of the metropolitan area," App. 8, and because it wished to maintain "communities of interest." App. 11. In addition, the court noted that "no precise count of a district's population can be made using 1990 data." App. 12.

Judge Edmondson did not file a written dissenting opinion. During the August 22, 1995 hearing, however, he indicated in comments from the bench that the duty of a federal court was "in each instance to make the least amount of changes, the fewest amounts of changes, and

the least dramatic changes, possible" to bring a plan into compliance with the Constitution. Transcript of Hearing, p. 29. In his opinion, the court did not have a license to "just redraw Georgia." *Id.* at 36.

On January 8, 1996 the court denied appellants' motion for reconsideration and an evidentiary hearing to challenge the court ordered plan. App. 44. Appellants filed their notice of appeal on January 11, 1996. App. 46.

THE QUESTIONS ARE SUBSTANTIAL

This appeal raises substantial questions involving federalism and respect for state policy making, the appropriate limits of federal judicial power, and the standards applicable to court ordered redistricting in the wake of *Miller v. Johnson*. The questions are of exceptional importance since they have the potential for affecting redistricting plans not simply for Congress, but for numerous state and local jurisdictions throughout the country that have come under increasing attack in *Miller* type challenges.[4]

[4] Both before and after *Miller* court ordered congressional and/or legislative plans have been implemented in a number of jurisdictions, *e.g.*, South Carolina (Burton v. Sheheen, 793 F.Supp. 1329 (D.S.C. 1992)), *vac. and remanded sub nom.* SRAC v. Theodore, 113 S.Ct. 2954 (1993), California (DeWitt v. Wilson, 115 S.Ct. 2637 (1995), *affirming* 856 F.Supp. 1409 (E.D.Cal. 1994)), Florida (De Grandy v. Wetherell, 794 F.Supp. 1076 (N.D.Fla. 1992)), Louisiana (United States v. Hays, 115 S.Ct. 2431 (1995)), Alabama (Wesch v. Hunt, 785 F.Supp. 1491 (S.D.Ala. 1992), *aff'd sub nom.* Camp v. Wesch, 112 S.Ct. 1926 (1992), Figures v. Hunt, 113 S.Ct. 1233 (1993)). In Georgia, the plaintiffs in *Miller* have moved to amend their complaint to challenge 28 of the state's 54

The lower court read *Miller* as giving it a license to redraw the congressional map of Georgia and to substitute its own districting preferences for those of the state, and specifically disavowed any obligation to preserve insofar as possible elements of the first plan enacted by the legislature following the 1990 census, including the location of the Eleventh District and the creation of two majority black districts. Unless the decision below is reversed, *Miller* will be interpreted as authorization for federal courts to displace state officials and state policies in the redistricting process. The decision will also lead to the destruction of majority black districts at every level of government. Inevitably, the number of blacks holding public office will substantially decline. These consequences, which could not have been intended by this Court, would be tragic for blacks and for all Americans. They would not only undermine the Voting Rights Act but the very concept of democratically elected government.

I. The "Drastic Changes" Approach of the District Court Is Contrary to the Decisions of this Court

The district court redrew the entire congressional map for the state of Georgia, proceeding by its own

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majority black house and senate districts and have asked the district court to implement court ordered plans for the next elections. Johnson v. Miller, Civ. No. 194-008 (S.D.Ga.), Plaintiff's Motion to Reopen case, Supplement Complaint and to Add Parties. Similar *Miller* type challenges have also been filed against state house and senate redistricting in South Carolina. Smith v. Beasley, Civ. No. 3-95-3235 (D.S.C.); Able v. Wilkins, Civ. No. 3-96-0003 (D.S.C.).

admission as if the state had adopted "no plans," App. 7, and making admittedly "drastic changes." App. 6. In doing so, the district court contravened the precedents and directives of this Court that federal court ordered remedies be limited to those minimally necessary to cure any constitutional defect.

A. Standards Applicable to Court Ordered Plans

Court ordered redistricting plans are held to higher and different standards than legislatively adopted plans. While an elected legislature is situated to identify and reconcile traditional state policies, "[t]he federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Connor v. Finch*, 431 U.S. 407, 415 (1977). Because of the intrusive nature of court ordered redistricting and the need for circumspection, *Chapman v. Meier*, 420 U.S. 1, 26 (1975), court-ordered plans must be " 'free from any taint of arbitrariness or discrimination.' " *Connor v. Finch, supra*, 431 U.S. at 415, *quoting Roman v. Sincock*, 377 U.S. 695, 710 (1964).[5]

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[5] One of the reasons federal courts should act circumspectly and adhere to state legislative policy choices where possible is to avoid even the appearance of partisan or other bias. The "drastic changes" approach of the district court in this case has, unfortunately, given rise to speculation that the plan was driven by partisan bias. *See* Jeff Dickerson, "At Christmas, black party loyalty doesn't pay off," The Atlanta Journal, December 20, 1995 ("The judges – both appointed by Democrats, coincidentally – did away with two of the state's three majority black districts, balkanizing the black vote in a way that benefits white Democrats"); Kevin Merida, "ACLU to

The powers of the federal courts must be adequate to the task of fashioning remedies for constitutional violations, but those powers "are not unlimited." *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971). Any remedy must be related to "the condition alleged to offend the Constitution." *Milliken v. Bradley*, 418 U.S. 717, 738 (1974). *See Missouri v. Jenkins*, 115 S.Ct. 2038, 2058 (1995) (federal courts do not have "a blank check to impose unlimited remedies upon a constitutional violator") (O'Connor, J., concurring).

A court "should follow the policies and preferences of the State, expressed in statutory and constitutional provisions or in reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution." *White v. Weiser*, 412 U.S. 783, 795 (1973). The decisions and judgments of a state legislature "in pursuit of what are deemed important state interests . . . should

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Appeal Decision Remapping Ga. Districts," Washington Post, December 15, 1995 (quoting the chair of the Georgia Democratic Party that "[t]he changes that were made favored us in virtually every district"); Mike Christensen, "Reactions to the plan are all over the map," Atlanta Journal Constitution, December 14, 1995 (quoting Rep. John Linder that " '[i]t appears that the two Democratic judges tried to draw a map for white Democrats . . . [w]hat [Georgia House Speaker] Tom Murphy couldn't get done on the floor of the Legislature he got the judges to do for him' "). Public trust and confidence in the impartiality of the judiciary cannot but be undermined by the unnecessary breadth of the redistricting by the district court in this case. *Cf.* Miller v. Johnson, *supra*, 115 S.Ct. at 2497 (O'Connor, J., concurring) ("[a]pplication of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts").

not be unnecessarily put aside in the course of fashioning relief." *Id.* at 796.

These principles are best exemplified by *Upham v. Seamon*, 456 U.S. 37 (1982). There, the Attorney General objected under Section 5 to two congressional districts in Texas. The district court proceeded to resolve the objections to the districts but in addition devised its own plan for four other districts as to which there had been no objection. 456 U.S. at 40. In vacating the decision, the Court noted that "[t]he only limits on judicial deference to state apportionment policy . . . were the substantive constitutional and statutory standards to which such plans are subject." 456 U.S. at 42. In fashioning a court ordered remedy, therefore, a district court may not reject state policy more than is necessary "to meet the specific constitutional violations involved." *Id.* In remanding the case for further proceedings, the Court concluded that:

> Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of 'reconciling the requirements of the Constitution with the goals of state policy.' *Connor v. Finch, supra*, at 414, 97 S.Ct. at 1833. An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect. Thus, in the absence of a finding that the Dallas County reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free, and certainly

was not required, to disregard the political program of the Texas State Legislature.

456 U.S. at 43.

In light of *Upham*, the district court's remedial powers in this case were limited to curing any constitutional defects in the Second and Eleventh Districts. The court's "drastic changes" approach cannot be squared with *Upham* and the other redistricting decisions of this Court.

B. Ignoring the State's Interest in Two Majority Black Districts

The court's plan eliminated two of the three majority black districts in the existing plan, despite the fact that the legislature intended to (and in fact did) create a second majority black district after the 1990 census, which gave the state an additional seat in Congress. App. 22.[6] The court's justification for refusing to draw a second majority black district was that "Georgia's minority population is not geographically compact." App. 22. The

[6] In submitting its first plan, the state reiterated "its stated goals of meeting the one person-one vote standard and not diluting minority voting strength. . . . This was achieved by creating a second majority black Congressional district as the additional Congressional seat provided to Georgia by the 1990 decennial census. . . . Therefore, the State of Georgia is pleased to present a Congressional plan which has increased the number of majority black Congressional districts from one to two." Johnson v. Miller, Civ. No. 194-008 (S.D.Ga.), Plaintiffs' Exhibit 1.

legislature, however, in enacting its first plan was obviously of the view that the black population *was* sufficiently compact to constitute a majority in a second congressional district.[7]

This Court held in *Miller* that the legislature's *third* post-1990 plan – adopted after the Attorney General refused to preclear the first two plans – was unconstitutional, but it never held or suggested that the first plan was unconstitutional. Insofar as the Voting Rights Act is concerned, the Court acknowledged that the first plan was " 'ameliorative' and could not have violated § 5's non-retrogression principle." *Miller v. Johnson, supra,* 115 S.Ct. at 2492.

The first plan was based upon the state's traditional districting principles and would not therefore trigger strict scrutiny under *Miller v. Johnson*. *See* 115 S.Ct. at 2497 ("[t]o invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices") (O'Connor, J., concurring). None of the state defendants contended below that the first plan was unconstitutional or that it subordinated the state's traditional redistricting principles to race.

[7] Proposed remedial plans submitted by the parties and *amici* also showed that a compact second majority black district can in fact be drawn in Georgia. In any event, "compactness" was not one of the state's redistricting guidelines or principles. *Miller*, 115 S.Ct. at 2483.

The contemporaneous record, always the best evidence of legislative intent,[8] shows that the defendants believed the first plan complied with constitutional and Voting Rights Act standards, as well as the state's traditional redistricting principles. According to defendant Murphy, the first plan the state drew "suited me." *Johnson v. Miller*, Civ. No. 194-008 (S.D.Ga.), Testimony of Thomas Murphy, Transcript Volume II, p. 80 ("T. Vol."). He did not regard it as a "gerrymander," *id.*, because "the first reapportionment we went on didn't have any irregular features." T.Vol. II, p. 83. Bob Hanner, the chair of the house reapportionment committee, testified that in drawing the first plan the legislature tried to avoid minority vote dilution and to maintain "communities of interest," *i.e.*, "to keep the interest of the coastal interest intact, the agricultural interest intact, the carpet interest intact, and the mountainous interest intact." Testimony of Bob Hanner, T. Vol. III, 107.

It was error for the district court to ignore the policy judgments of the legislature. Under *Upham* the court was not free to impose its own belief that, in the court's words, "Georgians deserve a better fate" than to have two majority black congressional districts. App. 22. That is especially true when in doing so, as noted *infra*, the court diluted the voting strength of a "community

[8] *See* Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 267-68 (1977), and Edwards v. Aguillard, 482 U.S. 578, 595-96 n.19 (1987) (after-the-fact statements are of "little relevance in determining the intent of the legislature").

defined by actual shared interests." *Miller v. Johnson*, *supra*, 115 S.Ct. at 2475.

C. Relocating District Cores and Dislocating Incumbents

Disregarding the state's traditional and explicitly articulated interest of "preserving the core of existing districts," *Miller v. Johnson*, *supra*, 115 S.Ct. at 2483, the court completely relocated the Eleventh District and put it "in the Northeast Atlanta corridor" where it would be a " 'radius' District" and would have an "urban/suburban flavor." App. 14. The court paid lip service to maintaining "district cores" in its frequent references to the state's 1972 and 1982 plans. App. 15, 17-8. Not only were these plans malapportioned ten seat plans but both were superseded by the eleven seat plan first enacted by the general assembly following the 1990 census. The best and most reliable evidence of "district cores" was the first enacted plan, a plan which the court by its own admission ignored when it redrew the Eleventh District.

The district court also drastically reconfigured the Third and Tenth Districts. In the process, it created an Eighth District that, to use the words of this Court in invalidating the old Eleventh District, included areas that are "miles apart in distance and worlds apart in culture." *Miller v. Johnson*, *supra*, 115 S.Ct. at 2484. The Eighth is the kind of "geographic monstrosity" criticized by the majority in *Miller*. *Id.* A principal difference in the new Eighth and the old Eleventh is that the former is majority (72%) white, while the later was majority (60%) black, indicating that the district court employed the kind of dual

standard in redistricting disavowed by this Court in *Miller*. *See* 115 S.Ct. at 2497 ("certainly the standard [adopted in *Miller*] does not treat efforts to create majority-minority districts less favorably than similar efforts on behalf of other groups") (O'Connor, J., concurring).

The court's plan moved incumbents and pitted them against each other in a number of districts, again in disregard for the state's traditional and stated policy of "avoiding contests between incumbents." *Miller v. Johnson*, *supra*, 115 S.Ct. at 2483. Two of the three dislocated incumbents were black, and only these two were placed in new districts with other incumbents.

Finally, the court's plan shifted nearly a third of the state's population into new districts. Abrams Intervenors' Motion for Hearing and for Reconsideration, Declaration of Linda Meggers. Least-change plans proposed by the parties and *amici* showed that it was possible to draw far less disruptive plans that at the same time cured the constitutional defects in the prior plan. Abrams Intervenors' Memorandum in Response to Submission of Additional Demographic Evidence by Defendants Miller, Howard & Cleland, November 27, 1995 letter from Linda Meggers.

D. The District Court's Attempt to Distinguish *Upham*

The district court attempted to distinguish *Upham* by claiming that the state's third plan "does not represent the goals of Georgia's historic policies nor the state legislature's true intent." App. 4. Assuming that to be true, the "policies" and "true intent" of the state *were* represented

in the first plan enacted by the legislature *prior* to any involvement by the Department of Justice. That plan necessarily reflected the legislature's, not DOJ's, reapportionment policies and goals.

The district court further defended its "drastic changes" approach on the grounds that it was forced "to divine" or speculate about what "the legislature might have done had it not been for the DOJ's subversion of the redistricting process." App. 13. But the court did not have to resort to divination or speculation; in enacting the first plan, we know what the legislature *actually did*. Unless the state's legislative policies were unconstitutional, the district court was not free simply to ignore them.

The district court's plan is not the kind of minimally disruptive plan that the court was obligated to adopt. *Upham v. Seamon*, *supra*, 456 U.S. at 43. Probable jurisdiction should be noted to correct the district court's egregious departure from the precedents of this court.

II. The Plan Is Retrogressive in Violation of *Beer* and Section 5

The court's plan, which contains only one majority black district, is plainly retrogressive within the meaning of *Beer v. United States*, 425 U.S. 130, 141 (1976) (changes in voting that diminish minority voting rights are prohibited by the "effect" language of Section 5). The plan reduced the number of majority black districts from the levels in the third legislative plan (which had three of eleven) and the first legislative plan (which had two of eleven), to only one of eleven in a state that is 27% black.

The court took the position that its plan was not retrogressive "when compared to the 1982 plan." App. 27. This comparison, however, overlooks the fact that the 1982 plan contained ten districts while the 1992 plan contains eleven. To use the well worn phrase, comparing the two plans is like comparing apples and oranges. The ten seat 1982 plan by definition cannot serve as "a reasonable benchmark by which to evaluate" the court's eleven seat plan. *Holder v. Hall*, 114 S.Ct. 2581, 2586 (1994).[9]

More appropriate benchmarks for determining retrogression are either the state's initial eleven seat plan containing two majority black districts, or the state's clearly articulated policy and goal of creating two majority black districts. Using either of these benchmarks, the court ordered plan would violate the retrogression standard of *Beer*.[10]

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[9] Even assuming the 1982 plan were a proper benchmark, the court ordered plan would still be retrogressive. Under the 1980 plan one (10%) of the ten districts was majority black. Under the court's plan only one (9%) of the eleven districts is majority black. Blacks would be worse off within the meaning of *Beer* under a plan in which they were a majority in one of eleven districts than a plan in which they were a majority in one of ten districts.

[10] It is unnecessary to reach the issue whether the third plan enacted by the general assembly cured of constitutional defects could serve as a benchmark since the court ordered plan would be retrogressive under a plan containing only two majority black districts.

III. The Plan Violates Section 2

While it refused to grant appellants a hearing on the issue, the court's plan, which creates only one majority black district, violates Section 2 of the Voting Rights Act. The record shows that blacks in Georgia are sufficiently compact geographically that two majority black districts can be drawn,[11] that blacks are politically cohesive, and that on a statewide basis whites vote as a bloc usually to defeat the candidates preferred by blacks.[12] *Thornburg v. Gingles*, 478 U.S. 30 (1986). In addition, the totality of the circumstances, including evidence of past discrimination and its continuing effects, strongly supports a finding that the court's plan would result in discrimination in violation of Section 2. *Johnson v. De Grandy*, 114 S.Ct. 2647, 2660 (1994).

The court's plan is a classic example of fragmenting concentrations of minority population with the result that

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[11] Although the district court found otherwise, that finding is both clearly erroneous and contrary to the districting policies adopted by the state. Linda Meggers, the state's chief demographer, testified that it was possible to create a second majority black district without splitting rural counties, and that she had in fact done so. Johnson v. Miller, Civ. No. 194-008 (S.D.Ga.), Transcript of Hearing, October 30, 1995, p. 445. In addition, the house passed a plan during the abortive special session following remand creating a second majority black district which Ms. Meggers conceded was "in terms of its size . . . within the range of districts that the state has created in the past." *Id.* at 444.

[12] As the district court found, based on a "statewide" analysis by the defendants' expert, App. 26 n. 18, a district containing "black registered voters as close to fifty-five percent as possible was necessary . . . to avoid dilution." App. 26.

blacks are a majority in fewer districts. *See Connor v. Finch, supra,* 431 U.S. at 423 (criticizing redistricting in Mississippi which fragmented areas "where much of the Negro population is concentrated"). *Also see* Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* 51 (1990) (identifying "the fragmentation of black population concentrations to prevent blacks from having an effective voting majority in any district" as one of the techniques of racial gerrymandering in favor of white voters). The black population in the Second and Eleventh Districts was dispersed into Districts One, Three, Four, Eight, and Ten. As a consequence, blacks are between 23% to 35% in six districts, but a majority in only one.

The district court candidly acknowledged "a significant drop in the probability of a black candidate being elected as the black percentage of registered voters declines to fifty percent." App. 26. For that reason, in Georgia a district containing approximately 55% of black registered voters was necessary "to avoid dilution" of minority voting strength. *Id.* Unfortunately, given its own analysis and definition of minority vote dilution, the court's plan fails to meet Section 2 standards.

A. The Court was Required to Hold a Section 2 Hearing

In *Burton v. Sheheen,* 793 F.Supp. 1329 (D.S.C. 1992), the district court implemented court ordered congressional and legislative redistricting plans but refused to conduct a Section 2 evidentiary hearing to provide the parties an opportunity to challenge the plans. According

to the district court, "the evidentiary burden presented by a § 2 challenge to each proposed plan in this case would have been staggering and would likely be ongoing." 793 F.Supp. at 1353. On appeal this Court vacated and remanded *sub nom. SRAC v. Theodore,* 113 S.Ct. 2954 (1993), "for further consideration in light of the position presented by the Solicitor General in his Brief for the United States filed May 7, 1993."

The Solicitor General's position was that:

> the court was required to afford all parties the opportunity to present specific Section 2 objections before imposing those plans for use in future elections. The court should have received and reviewed evidence concerning each challenged district, considered that evidence in light of all of the relevant factors enumerated in *Gingles,* and included in its opinion specific, reviewable findings of fact and conclusions of law with respect to each such district's compliance with federal law. Such a process would be fair to the parties, present the district court with a judicially manageable task, take advantage of the district court's familiarity with the specific facts and arguments in the case, and properly assist this Court in its appellate review.

SRAC v. Theodore, No. 92-155 (S.Ct.), Brief for the United States as Amicus Curiae, pp. 18-9.

In this case, the district court held a hearing to allow the parties an opportunity to present remedial plans of their own, but it never held a hearing to allow the parties an opportunity to present evidence and comment on whether or not the court's plan complied with the Constitution and the Voting Rights Act. In light of *SRAC v.*

Theodore, it was error for the district court to deny appellants an evidentiary hearing on the court's plan.

IV. The Plan Does not Comply with One Person, One Vote

Because congressional redistricting is governed by Article I, Section 2 of the Constitution, "absolute population equality [is] the paramount objective." *Karcher v. Daggett*, 462 U.S. 725, 732 (1983). Federal courts, moreover, are held to even stricter standards in redistricting than legislatures. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978).

The total deviation among districts in the district court's plan is 0.35%. App. 39. A plan with a lower overall deviation (0.19%) was prepared by the Department of Justice. United States' Response to Plaintiffs' Plans Remedy 4X and 4X-R. Given modern computer technology, there is no reason why there should be any deviation in a court ordered congressional redistricting plan. Other district courts have had no difficulty in drafting or approving plans with zero deviations. *See Hastert v. State Board of Elections*, 777 F.Supp. 634, 644 (N.D.Ill. 1991) (adopting a plan containing "mathematically perfect population equality"), and *Burton v. Sheheen, supra*, 793 F.Supp. at 1367-68 (court ordered plan containing zero deviation).

The district court did not contend that it was impossible to construct a plan with a lower deviation. Instead, it attempted to justify the deviation by deferring to the state's alleged preference for not splitting counties outside of the metropolitan area, App. 8, because it wished

to maintain "communities of interest," App. 10, and because the 1990 census was stale. App. 12. *Karcher v. Daggett, supra*, 462 U.S. at 738, rejected a similar attempt to "explain population deviations on the basis of flaws in census data." *Karcher* also rejected the notion that Article I, Section 2 tolerated *de minimis* deviations. 462 U.S. at 734 ("[w]e thus reaffirm that there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2, without justification").

Karcher held that to justify deviations based upon asserted state interests such as preserving political boundaries, a state would have to do more than rely on "general assertions." 462 U.S. at 741. The general assertions made by the district court in this case do not begin to meet the standard of specificity demanded by *Karcher* to excuse compliance with the constitutional standard of absolute population equality.

CONCLUSION

For the above reasons, this Court should summarily reverse or in the alternative note probable jurisdiction of this appeal.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

DAVIDA JOHNSON; PAM BURKE; HENRY ZITTROUER; GEORGE L. DELOACH; and GEORGE SEATON,	)	CV 194-008
Plaintiffs,	)	
v.	)	
ZELL MILLER, in his official capacity as Governor of the State of Georgia; et. al.,	)	
Defendants.	)	

Before EDMONDSON, Circuit Judge; EDENFIELD, Chief Judge; and BOWEN, District Judge.

ORDER

(Filed Dec. 13, 1995)

This Court's September 12, 1994, Order declared Georgia's Eleventh Congressional District unconstitutional. *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994) ("*Johnson* I"). The Supreme Court affirmed our decision in *Miller v. Johnson*, ___ U.S. ___, 132 L.Ed.2d 762 (1995) ("*Johnson* II"). In accordance with the Supreme Court's affirmance, we held a hearing on August 22, 1995, to determine the best means of resolving the issue of remedy. Plaintiffs moved for leave to add residents of Georgia's Second Congressional District in a constitutional challenge thereto. The Court granted that motion, held a

trial, and declared the Second District unconstitutional. *Johnson v. Miller*, ___ F. Supp. ___ (S.D. Ga. 1995) ("*Johnson* III").[1]

As to the remedy, we deferred to Georgia's legislature, allowing it an opportunity to draw a new congressional map in accordance with the Supreme Court's holding and this Court's prior findings. *Growe v. Emison*, ___ U.S. ___, 122 L.Ed.2d 388 (1993). Time obviously was of the essence in light of the rapidly approaching 1996 Congressional elections and the more imminent 1996 congressional campaigns. However, the legislature notified the Court on September 13, 1995, that it was unable to redraw the map and had adjourned, effectively leaving the task to us. *See* "Notice of Def. Murphy with Respect to Legislative Adjournment." We are therefore forced to redraw Georgia's congressional districting plan.

I. Scope of Remedy

In fashioning a remedy in redistricting cases, courts are generally limited to correcting only those unconstitutional aspects of a state's plan. *Upham v. Seamon*, 456 U.S. 37 (1982). The rationale for such a "minimum change" remedy is the recognition that redistricting is an inherently political task for which federal courts are ill-suited. *Id.* at 41-42. A minimum change plan acts as a surrogate

[1] All page references to *Johnson* III are to the manuscript Order on file with the clerk's office. All references to transcripts from the Eleventh District trial will be "Eleventh Trl. Trans.," and reference to the Second District trial will be "Second Trl. Trans."

for the intent of the state's legislative body. *See Id.* at 43 (district court must reconcile Constitutional requirements with goals of state policy); *White v. Weiser*, 412 U.S. 783, 795 (1973) ("district court should . . . honor state policies in the context of congressional reapportionment").

In *Upham*, the Texas legislature had passed a congressional districting plan and submitted it to the U.S. Department of Justice ("DOJ") for preclearance. While the plan was with the DOJ, a case was filed in district court challenging the plan's constitutionality under the Voting Rights Act ("VRA"). The U.S. Attorney General also objected to the plan, specifically objecting to two of the plan's twenty seven districts. The three judge panel determined that the two districts were unconstitutional, and devised a plan of its own. The court's plan redrew the two objectionable districts and two adjoining districts. However, in doing so, the Court substituted its own judgment for the Texas legislature's and redrew districts in Dallas County in addition to the two objectionable south Texas districts. Reasoning that the legislatively-drawn districts would have failed retrogression analysis, the court redrew the Dallas County districts under the stricter standard applicable to courts. Thus, the court ignored the legislature's preferences.

Reversing, the Supreme Court held that the district court erred in redrawing the Dallas County districts absent an objection to those by the attorney general or a specific finding that they were unconstitutional. The Court stated that a "district court's modifications of a state plan [should be] limited to those necessary to cure any constitutional or statutory defect." *Upham*, 456 U.S. at 43. And, " '[i]n fashioning a reapportionment plan or in

choosing among plans, a district court should not preempt the legislative task nor intrude upon state policy any more than necessary.' " *Id.* at 42 (quoting *Weiser*, 412 U.S. at 794-95). The Court had no objection to the district court's correction of the two objectionable districts or the two adjoining districts that were necessarily impacted as a result thereof.

At first glance it appears that, in remedying Georgia's constitutionally infirm congressional districting plan, we are faced with the same task as the *Upham* court, which would entail making only those changes necessary to bring the current plan into constitutional compliance. However, this Court's remedial task differs from that of the *Upham* court's because Georgia's current plan was not the product of Georgia's legislative will. Rather, the process producing Georgia's current plan was tainted by unconstitutional DOJ interference. *See Johnson* I, 864 F. Supp. at 1367-68. By virtue of its unconstitutional origin, Georgia's current congressional plan cannot form the basis for the remedy we now construct because it does not represent the goals of Georgia's historic policies nor the state legislature's true intent.

A. Department of Justice's Interference

Central to this Court's finding that the Second and Eleventh Districts are unconstitutional was the DOJ's level of involvement in the creation of the current plan. The DOJ used informants inside the legislature to keep tabs on the legislature's progress. *Id.* at 1367. It worked closely with the ACLU to help the ACLU achieve its objective of three majority-minority districts in Georgia.

Id. at 1362-63 (finding, among other things, that the "DOJ was more accessible and amenable to the opinions of the ACLU than to those of the Attorney General of the State of Georgia"). The DOJ rejected Georgia's first two plans even though they clearly did not violate Section 5 of the Voting Rights Act. *Johnson* II, 132 L.Ed.2d at 784. The DOJ basically used the preclearance process to force Georgia to adopt the ACLU redistricting plan and, in the process, subvert its own legislative preferences to those of the DOJ. The product of the process, the unconstitutional plan, more closely reflects the DOJ's and ACLU's intentions than the Georgia General Assembly's. *Johnson* I, 864 F. Supp. at 1367 (finding the precleared plan "bore all the signs of DOJ's involvement"). Using the current plan as a basis for the remedy would, in effect, validate the DOJ's constitutionally objectionable actions. Thus, we cannot use Georgia's current plan as a surrogate for the legislature's reapportionment policies and goals. *See Johnson* II, 132 L.Ed.2d at 782 ("Georgia's . . . redistricting *plan* cannot be upheld unless it satisfies strict scrutiny," which the Court found it did not) (emphasis added); *Johnson* I, 864 F. Supp. at 1393 (finding "[i]n sum, the current districting *plan* is not reasonably necessary to comply with Sections 2 or 5 of the VRA. Since no compelling state interest other than VRA compliance is evident, the *plan* fails strict scrutiny under the Fourteenth Amendment") (emphasis added).

Because the current plan does not represent the Georgia legislature's intent, we are not bound by *Upham* to

make only minimal changes to the current plan in fashioning a remedy.[2] Finally, since two of Georgia's districts are unconstitutional, are on opposite sides of the state, and contain all or parts of nearly a third of Georgia's counties, any remedy even minimally disruptive to the current plan would necessarily have resulted in drastic changes.[3] Considering the objective that each congressional district should ideally contain 588,929 persons, it is a virtual impossibility to change less than we have.

B. Remedy

Because we are unable to use Georgia's current plan as the basis for a remedy, we were compelled to devise our own plan. The remedy we devised and now order into effect is attached to this order as Appendix A, with the verbal census block description attached as Appendix B. The plan contains one majority-minority district, has an overall population deviation of .35%, and an average deviation of .11%. The plan and how we devised it we further explain below.

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[2] This does not mean that we ignored the current plan altogether, only that our consideration of it was tempered by its origins.

[3] The DOJ's demand for three majority-minority districts resulted in land bridges, splitting numerous counties outside of metropolitan Atlanta predominantly for racial reasons, and splitting 70 voting precincts for the same reasons. *Johnson* I, at 1367; *Johnson* III, at 6.

II. Remedial Factors

Since the Court is not limited to Georgia's current unconstitutional plan, the Court's task is akin to those cases in which states had no plans. Thus, when devising the remedy, the Court was bound by the stricter guidelines applicable to court plans. These guidelines include the one person-one vote requirement and the state's traditional districting principles.

A. One Person, One Vote

The Equal Protection clause of the Constitution requires "no less than substantially equal . . . representation for all citizens, of all places as well as of all races." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). In adhering to this principle of one person-one vote, the Supreme Court has allowed legislatures only the narrowest of margins in population deviations when drawing congressional districts. *See Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (requiring congressional districts to be "as nearly as is practicable" to one person-one vote); *Karcher v. Daggett*, 462 U.S. 725, 732-33 (1983) ("absolute population equality [is] the paramount objective" in congressional apportionment). Since federal courts are held to stricter standards than legislatures in redistricting, *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978), we were particularly constrained to create a remedy with the lowest population deviation practicable.

Our remedy's population deviation is not perfect. The Supreme Court's mandate that courts follow a state's

historical legislative districting principles sometimes conflicts with the one person-one vote requirement. Where such tensions existed, we sought to defer to one person-one vote without decimating the historical character of Georgia's congressional plans. The resultant remedy contains a lower deviation than the current Georgia plan, the 1982 plan, and any other plan presented to the Court which was not otherwise constitutionally defective.[4] Nevertheless, there is some deviation resulting from our adherence to Georgia's traditional districting principles and unique factors, some of which we pause to reconcile here, the remainder of which we discuss in Part II(B) *infra*.

Georgia's strong historical preference for not splitting counties outside of the metropolitan Atlanta area, as well as other unique factors, account for some of our plan's deviation. *See Connor v. Finch*, 431 U.S. 407, 419-20 (1977) (in court plan reapportioning state legislature, court is required to enunciate historically significant state policy or unique features that result in deviation from ideal district size); *Weiser*, 412 U.S. at 795 (1973) ("District Court should . . . honor state policies in the context of congressional reapportionment").

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[4] The DOJ presented a plan containing a slightly lower overall deviation than the Court's plan. However, its plan split numerous counties outside of the metropolitan Atlanta area, apparently for racial reasons. Whether the DOJ should be involved in this, the map-generation phase of the redistricting process is questionable. Normally, Georgia would originate a plan for DOJ preclearance under VRA Section 5. Regrettably, we are standing in the state's shoes, and our plan is not subject to Section 5 in any event.

Georgia has preferred to split counties only in the Atlanta area where division was necessary because of Atlanta's dense population relative to other areas of the state. We did rearrange precincts in the Atlanta area for purposes of achieving better deviations.[5] Of course, we attempted to avoid splitting voting precincts (with the exception of Cobb and Clayton Counties)[6] due to Georgia's preference against that practice.[7] The unconstitutional plan splits twenty-eight

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[5] The Court was able to achieve such low deviations by placing Talbot County in the Third District, thereby reducing the Second District's deviation to -.23%. This also allowed a transfer of population from the Third District to the under-populated Fifth District. The Fifth District does extend into Dekalb County somewhat, an extension necessary to allow other precincts in the Atlanta area to be relocated in order to achieve vastly improved deviation, and also keep the City of Atlanta wholly within the Fifth District. The Court's splitting of Dekalb and other Atlanta area counties is consistent with the Georgia General Assembly's decision to split those counties due to the heavy population concentrations in that region of the state.

[6] A look at a map of the City of Marietta and Cobb County reveals that every plan drawn at any level (county commission, state house, state senate, and congressional) must of necessity split some precincts in the Marietta-Cobb County area because of an annexation pattern that created noncontiguous enclaves and exclaves. There are pieces of the city that are islands in the county and vice versa. Def. Exh. 92.

In Clayton County, two precincts were split along already existing school board or county commission lines, and a third was split along a major geographical features. These enabled the Court to achieve lower deviations in the Third and Fifth Districts without causing the problems discussed in footnote seven, *infra*.

[7] As we have noted:

> [O]ne bad side effect of the splitting of units as small as precincts for racial purposes occurs when the precinct is divided in one way for a state house seat,

precincts in the Second District alone (seventy overall), all predominantly for racial reasons. *Johnson* III, at 6. The product of the Court's efforts is a lower overall deviation than Georgia's 1982 and 1992 plans.

However, maintaining political subdivisions (counties) cannot alone justify less than perfect deviation in a court plan. *Cf. Karcher,* 462 U.S. at 740 ("we are willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts"); *Weiser,* 412 U.S. 783 (1973) (mandating strict adherence to legislative policies). We therefore considered splitting counties outside of the Atlanta area, but other factors unique to Georgia militated against it.

Other factors causing the slight deviation include maintenance of core districts and communities of interest. Georgia has historically preferred to maintain the core of each district during reapportionment. Cf. 1972 Plan, Def. Exh. 14, and 1982 Plan, Pl. Exh. 41, Def. Exh. 15. Our

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> another way for a state senate seat, and yet a different way for a congressional seat. When this kind of gerrymandering is repeated often enough, the voting combinations are so rare . . . that a secret ballot becomes difficult for some voters.

Johnson III at 6 n.3; Second Trl. Trans. at 28. The Court believes the same result could obtain from splitting precincts for any reason, not only racial. Thus, except in one instance, the Court avoided splitting precincts unless they were split in the same manner at other election levels, and then only where absolutely necessary. The new split precinct has its boundaries along easily identified major roadways.

remedy maintains ninety-five counties (totally or partially) in the same districts as they were located in the 1982 plan – significant given the addition of the Eleventh District, which in the remedy contains thirteen counties.

Maintaining county boundaries also helps to ensure that communities of interest are maintained within the same district. Residents of a particular county are similarly affected by the decisions of their elected representatives. People who share communities of interest logically belong within the same congressional district. *See Johnson* II, 132 L.Ed.2d at 782 (discussing significance of communities of interest).

Incidentally, a factor unique to Georgia, and one which enables a draftsman to reach near perfect deviations without splitting counties, is the number of Georgia counties: 159. Most of the counties are more sparsely populated than the Atlanta area counties. With such a high number of counties, we were able to achieve extremely low deviations without splitting non-Atlanta area counties. *Cf. Mahon v. Howell,* 410 U.S. 315, 321 (1973) (allowing states to "use political subdivision lines to a greater extent in establishing state legislative districts" because of the greater number of state legislative districts to be apportioned as compared to the lesser number of congressional districts), *modified* 411 U.S. 922 (1973).[8] As we have noted:

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[8] The correspondingly high number of counties in Georgia afforded the Court the same opportunity to maintain county boundaries (outside of metropolitan Atlanta counties) among the eleven congressional districts.

> With the exception of Texas, Georgia has more counties than any other state in the Union; one would think that such a proliferation would provide ample building blocks for acceptable voting districts without chopping any of those blocks in half.

Johnson I, 864 F. Supp. at 1377.

In the calculus of district population deviation, our only measure of the state's demographics is the decennial census. Since the population is not static, we adhered to the fiction that the census block figures are accurate to the exclusion of all others. In 1995, no precise count of a district's population can be made using 1990 data. We are halfway through the decade. Changes have occurred in Georgia. *See, e.g.,* footnote 17, *infra.* In sum, using the available data and whole counties outside of the Atlanta area, our remedy is probably as close to "zero deviation" as one can be. At this point in the decade, the deviation effort is largely theoretical. The real data, known only to providence, would doubtlessly lead us to another result.

Yes, we remain sensitive to the extant deviation, so we now explain the other factors we were compelled to consider.

B. Adherence to Georgia's Historic Districting Preferences

1. Source of Georgia Legislature's Intentions

Since redistricting is an inherently political process, federal courts undertaking the task must adhere to the state's historical districting preferences and traditions.

Upham, 456 U.S. at 39; *Weiser,* 412 U.S. at 795. The problem facing the Court was that, unlike the situation in *Upham,* Georgia's current plan does not represent the political will of Georgia's citizens. *See* Part I, *supra.* The issue then became where we should look to divine Georgia's true political will. Given the unique events of Georgia's 1992 redistricting process, the Court has a better understanding of what the legislature might have done had it not been for the DOJ's subversion of the redistricting process.

We drew upon Georgia's 1972 plan and 1982 plan, as well as the first plan enacted in 1992,[9] to determine how the legislature typically maintains district cores from one plan to another. Our first hurdle was where to locate the new Eleventh District. Since significant population growth is occurring in the Atlanta area, it follows that the new district would be created where future growth is anticipated. Carving the new district where growth is projected allowed us to include fewer counties within the district, consequently enabling us to better maintain district cores.

We placed the new Eleventh District in the Northeast Atlanta corridor out to the northeast Georgia state line. The Eleventh district now contains counties which are

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[9] The first 1992 plan gave us a clearer understanding of legislative intent, but it was not a perfect guide since it contained many of the same features in its Eleventh District that found their way into the unconstitutional Eleventh – connecting the south Dekalb County urban minority population with the primarily rural east Georgia minority population.

becoming more urban with the population growth, notably Walton County and Newton County. Eleventh Trl. Trans. III at 26. The Eleventh also contains the Athens-Clarke County area which has become a metropolitan area in its own right, and locating it in the Eleventh is consistent with the new Eleventh's urban/suburban flavor. *Id.*

The resulting Eleventh District is a relatively compact grouping of counties which follow a suburban to rural progression and have Interstate Eighty-Five as a very real connecting cable. The road net, the area's commerce, its recreational aspect, and other features produce a district with a palpable community of interests. As a "radius" district reaching from suburban Atlanta to the state line, the new Eleventh has an analogous resemblance to the Third, Seventh, and Ninth Districts.

Georgia's Tenth District has historically been located in the east-central portion of the state, with Augusta as its main hub. Eleventh Trl. Trans. III at 26; 1940 Plan, Jt. Exh. 16; 1972 plan. Addition of the Eleventh precipitated a shift in the Tenth District south, but the Tenth retains Augusta as its main hub and retains its primarily rural character. The Court began here, and the remainder of the remedy fell into place along the lines of Georgia's historic plans, maintaining district cores where possible.

2. Georgia's Traditional Districting Factors

While Georgia's legislature considers many factors in the apportionment process, there are a few factors that have historically guided the legislature in the process more so than others and which are evident in the plans it

has historically enacted.[10] These factors, all of which have heavily influenced past apportionment plans in Georgia, are the primary factors that guided our development of this remedy. We explore some of them below, and we note that consideration of them was tempered by the one person-one vote principle.

a. Maintaining Political Subdivisions

The Georgia General Assembly has strongly adhered to the principle of maintaining counties within the same congressional district. Georgia did not split a county until 1972, when it was necessary to do so because of the dense population in the metropolitan Atlanta area. *See* 1972 Map. The 1982 plan only split three counties, again in the Atlanta area for population density reasons.[11] Eleventh Trl. Trans. III at 36. Likewise, our remedy splits only six counties, all within the Atlanta area, and all split for population density reasons.[12] In comparison, the current

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[10] Other factors the legislature has considered include avoiding contests between incumbents, drawing districts to include certain state political officers, and drawing districts so as to avoid having certain state officers represented by members of the opposite political party. Eleventh Trl. Trans. III at 21. Because these were not predominant factors the state has considered in the past, they were given less weight since they are inherently more political in nature than the more objective factors.

[11] As noted above, the large number of counties in Georgia affords a draftsman much flexibility in achieving near perfect deviation numbers while maintaining county boundary lines.

[12] Evidence showed that the significant population growth in Georgia is occurring in the metropolitan Atlanta area. Given the population density of those counties, it would be impossible to avoid splitting any counties.

unconstitutional plan split twenty-three counties, seventeen of which were split for no reason other than race.

Maintaining Dekalb County entirely within one district was a feature of several plans submitted to the Court. However, we chose to split Dekalb, removing a few voting precincts from the Fourth District and placing them in the Fifth District in order to achieve near perfect deviations in those Districts.[13] The other reasons for doing this were: 1) the Georgia legislature has already made the political decision to split Dekalb for population density reasons, first in 1982, and again in each of the three plans presented to the DOJ for preclearance in 1992; 2) the result was an increase in the Fifth District's minority voting age population from fifty-three precent to fifty-seven percent, an increase most likely required by the VRA;[14] and 3) the City of Atlanta, a significant political subdivision in its own right, is encompassed completely by the Fifth District.

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[13] Since Dekalb County is a densely populated county in the Atlanta area, splitting it is acceptable under the one person-one vote principle. The legislature split it in the past to comply with that principle.

[14] *See* Part II(B)(2)(t)(1)(iii) (discussing the importance of maintaining black percentage of registered voters as close to fifty-five percent as possible). With the exception of four Dekalb precincts moved to the Fifth District, the rest of the Dekalb precincts were part of the Fifth in the 1982 plan and remain in the Fifth under our plan.

b. Four "Corner Districts"

Georgia historically has maintained four "corner districts" in its Congressional plans. Eleventh Trl. Trans. III at 23-27. The four "corner" districts include: 1) the southeastern coastal district, comprising the coastal counties and the other counties most closely related to them; 2) an agrarian district in southwest Georgia, prominent for its peanut production; 3) the northwestern corner, known for its carpet production and isolated from the northeast Georgia counties by mountains; and 4) the northeastern corner, identified by its preeminent position in poultry production. Maintaining these districts is consistent with the community of interest factor approved by the Supreme Court. *Johnson* II, at 782. Our remedy adheres to all of these objectives with the exception of the northeast corner district, a necessary consequence of adding an eleventh district and the shift in counties that it precipitated.

c. Urban Minority District

In 1972 Georgia created an urban minority district in the Atlanta area to comply with the VRA. This is Georgia's sole majority-minority congressional district. Recognition of the Fifth District as an urban minority district resulted from voting rights litigation in the early seventies. Eleventh Trl. Trans. III at 27. Since race is a factor this Court can *consider*, we considered it insofar as the legislature would have considered it in maintaining one majority-minority district or else run afoul of VRA Sections 2 and 5.

Unlike the unconstitutional Eleventh District, Fifth District residents have a strong community of interest, and the geography of the district itself is compact and meets contiguity requirements. *See* Jt. Exh. 15; Jt. Exh. 1; Remedy, Appendix A. Also, Section 2 of the VRA required the Court to maintain the Fifth District as a majority-minority district. *See* Part II(B)(2)(f)(1), *infra*.

d. Maintaining District Cores

Georgia's legislature has historically sought to maintain district cores from one plan to another. The 1972, 1982, and the three 1992 plans that passed the legislature evidence this legislative preference. Our remedy bears a striking resemblance to these earlier plans, especially in the rural districts such as the First, Second, Eighth, and Ninth. *See* Part II(A), supra (noting that the remedy maintains ninety-five counties in the same districts as they were located in the 1982 plan, and the new Eleventh District contains thirteen of the remaining counties).

e. Protecting Incumbents

Georgia has historically sought to draw district lines so incumbents remain in their districts in a new plan and to avoid placing two incumbents in the same district. The Court considered this factor, but since it is inherently more political than factors such as communities of interest and compactness, we subordinated it to the other considerations. We note, however, that our remedy places incumbents in the same district in only two districts, while keeping eight incumbents in their present districts.

The remedy's Eight and Eleventh Districts do not currently have incumbents as residents. The incumbent from the former Eighth District resides in the remedy's Second District, and the Eleventh District incumbent resides in the remedy's Fourth District.

f. Voting Rights Act

1. Section 2

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, applies to any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . imposed or applied by any State or political subdivision. . . . " 42 U.S.C. § 1973(a). A plain reading of the statute would lead one to believe that Section 2 does not apply to a court-drawn and ordered redistricting plan. *See Holder v. Hall*, ___ U.S. ___; 129 L.Ed.2d 687 (1994) (Thomas, J. Dissenting). However, Section 2 does apply to certain cases in which a federal court orders a redistricting plan into effect. *See United States v. Dallas Cnty. Comm'n*, 850 F.2d 1433 (11th Cir. 1988) (holding that any proposed remedy for a *Section 2 violation* must meet Section 2 requirements), *cert. denied*, 490 U.S. 1030 (1989).

During the remedy phase of the hearing, a significant portion of the argument centered on whether the Court's remedy would be required by Section 2 to contain two majority-minority districts. We have considered Section 2 and the case law construing it, and we conclude that two majority-minority districts are not required by Section 2 because including two such districts would violate *Johnson* II's principles.

i) When Section 2 Requires Creation of a Majority-Minority District

States run afoul of Section 2 when they draw district lines which have the "*effect* of denying a protected class the equal opportunity to elect its candidate of choice." *Voinovich v. Quilter*, ___ U.S. ___, 122 L.Ed.2d 500, 512 (1993) (emphasis in original). Section 2 mandates that courts look at the totality of the circumstances when determining whether a violation exists. 42 U.S.C. § 1973(b). Plaintiffs establish a Section 2 violation by proving three factors, as first stated in *Thornburg v. Gingles*, 470 U.S. 30 (1986): (1) that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district;' . . . (2) that the minority group 'is politically cohesive; . . . [and] (3) that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' " *Voinovich*, 122 L.Ed.2d at 513-14 (quoting *Growe*, 122 L.Ed.2d at 403). However, these factors are not to be applied mechanically, *Johnson v. DeGrandy*, ___ U.S. ___; 114 S.Ct. 2647, 2655 (1994); *Voinovich*, 122 L.Ed.2d at 514, and while they are the preconditions a plaintiff must first establish to prove a Section 2 violation, they must be considered along with other factors when analyzing a Section 2 claim. *DeGrandy*, 114 S.Ct. at 2657.

ii) Why Section 2 Does Not Require a Second Majority-Minority District in Georgia

Ample evidence has been presented during the two trials to enable the Court to determine that Section 2 does not require creation of a second majority-minority district

in Georgia – due primarily to the geographic dispersion of its minority population and lack of any significant vote polarization. Creating a second majority-minority district would also violate the Supreme Court mandate under which we now operate because *Johnson* II held that the VRA cannot be applied to reach an unconstitutional result.

Analysis of a racial map of Georgia reveals that the state's minority population is widely dispersed.[15] In fashioning a remedy, we considered the possibility of creating a second majority-minority district and concluded that to do so would require us to subordinate Georgia's traditional districting policies and consider race predominantly, to the exclusion of both constitutional norms and common sense. Such a plan would directly contravene the Supreme Court's holding in *Johnson* II that race cannot predominate in the redistricting context absent a compelling justification for it. 132 L.Ed.2d at 782. Nonracial

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[15] There are heavy minority concentrations in south Dekalb and Fulton counties, east central Georgia (most of which is in the new Eleventh District), southeast Georgia in the coastal region (all of which are included in the new First District), the southwest corner of Georgia, and a concentration in the west-central portion of the state. Pl. Exhs. 17-23, 36-40. *Cf.* Def. Exh. 17; U.S. Exhs. 8-16. The only way Georgia could draw a majority-minority district in the southwest corner of the state was to use "narrow land bridges . . . and . . . a number of irregular appendages." *Johnson* III, at 6. The only way Georgia could create a majority-minority district out of the minority concentrations in east central Georgia was to link that rural minority population, again using land bridges and appendages, to the large urban minority population in south Dekalb County. *See* 1992 Plan. We will not repeat the same mistake.

factors do not support creation of a second majority-minority district largely because Georgia's minority population is not geographically compact. *DeGrandy*, 114 S.Ct. at 2655. Creating a second majority-minority district would require this Court to engage in the unconstitutional racial gerrymandering characteristic of the plan we now replace. Georgians deserve a better fate. "It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute . . . to demand the very racial stereotyping the Fourteenth Amendment forbids." *Johnson* II at 787.[16]

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[16] Georgia could consider race as a predominant factor in redistricting if such a consideration was necessary to meet strict scrutiny, *Johnson* II, 132 L.Ed.2d at 782. We cannot subvert Georgia's traditional districting principles in order to draw a second majority-minority district. If Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the Court would have included one since Georgia's legislature probably would have done so. The VRA does not require proportional representation, however. *See, e.g., White v. Regester*, 412 U.S. 755, 765-66 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 148-56 (1971). As the Supreme Court stated in *Shaw v. Reno*:

> The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. . . . That system, by whatever name it is called, is a divisive force in the community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense.

125 L.Ed.2d 511, 529 (1993) (quoting Justice Douglas' dissent in *Wright v. Rockefeller*, 376 U.S. 52, 66-67 (1964)).

At the remedy phase of the October, 1995 hearing, the counsel for the Speaker of Georgia's House of Representatives

Statistical evidence pertaining to statewide voting patterns in Georgia showed a significant degree of crossover voting. *Johnson* I, 864 F. Supp. at 1390. We observed that "[b]lack and black-preferred candidates in Georgia have achieved many electoral victories in local and statewide elections and have received significant – occasionally overwhelming – support from both black and white voters within the Eleventh Congressional District." *Id.* at 1390-91. During the Second District trial, Linda Meggers stated that election results in that district indicated white crossover voting. Second Trl. Trans. at 438. Indeed, Congressman Sanford Bishop, the black Congressman currently representing the Second District, agreed. *Id.* at 142. There is conflicting evidence on the degree of vote polarization in Georgia. This much is clear: while some degree of vote polarization exists, it is "not in alarming qualities." *Johnson* I, 864 F. Supp. at 1390. The

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observed that if the Court did include a second majority-minority district, it would be "set in stone." He contended that, since future plans would be measured against the Court's plan for purposes of VRA analysis, Georgia's legislature would be hamstrung to relocate the district elsewhere, or to alter the mix of counties included within the district, for fear of violating the VRA. Counsel for Amicus Curiae agreed, which is significant since the Amicus plan contains two majority-minority districts. *Cf. Johnson* I, 864 F. Supp. at 1386 (noting problems a plan attempting to give minorities proportional representation could present in drafting future plans to satisfy VRA). Since political considerations pervade the redistricting task, the Court feels that any permanent footprint left on Georgia's political landscape, especially one with such dangerous side effects as the Supreme Court has noted, should be left to those elected to make such decisions. In other words, we feel the need to intrude as little as possible in this inherently political territory.

second and third *Gingles* preconditions therefore would not be met in a Section 2 challenge to the remedy. Thus, the remedy we now impose meets the requirements of Section 2 without containing two majority-minority districts.

We note that several districts in the remedy do contain significant minority populations which could influence election results. The 1982 plan contained five districts with a minority population of greater than twenty-five percent, and three with a minority population of greater than thirty-five percent. Our remedy contains six districts with a minority voting age population of greater than twenty-five percent, and two districts, the Fifth and the Second, with a minority voting age population of greater than thirty-five percent, while the remedy's Tenth comes close to that with a minority voting age population of more than thirty-four percent. The remedy's minority percentage per district are comparable to those in the 1982 plan, even with the addition of the Eleventh District.

While we were required to use the 1990 census numbers in formulating the remedy, we note the demographic trend indicating that Dekalb County's population, which comprises the majority of the remedy's Fourth District, is becoming more heavily minority. This means that the Fourth District has the potential to become a very strong minority influence district or a majority-minority district as Georgia is reapportioned following future censuses, if it is not already.[17]

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[17] In its response to the Court's request for additional demographic information concerning minority population trends in Dekalb County, the State Defendants produced an affidavit of Linda Meggers. Ms. Meggers attests that while in 1990 27.4% of Dekalb County's registered voters were black, that number had increased to 35.7% by 1994. Meggers' 11/21/95 Aff. ¶ 7. She indicated the number could be as high as 39.4% in 1995, but that that number is due to a new voter registration law more than population shifts. *Id.* at ¶¶ 7-9. In any event, while the Court is bound to use 1990 census figures in formulating a remedy, we cannot ignore the strong trends in Dekalb County which indicate the remedy's Fourth District may be a stronger minority influence district than data based on the 1990 census would indicate.

The Abrams Intervenors do not dispute Meggers' figures; they only caution the Court that those figures must be viewed in light of the overall change in percentages for each district because some may have lost minority population. Their warning is duly noted.

iii) What Section 2 Does Require

While Section 2 does not require the Court to create a second majority-minority district, it does require maintenance of the Fifth District as a majority-minority district. The minority population in the Fifth District is sufficiently compact and, being an urban minority population, has a sufficiently strong community of interest to warrant being a majority-minority district. Compliance with the VRA required creating the Fifth as majority-minority in 1972. Eleventh Trl. Trans. III at 27. As a result of 1982 litigation, the Fifth District was required to have a minority population of sixty-five percent. *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

The minority population of sixty-one percent, minority voting age population of fifty-seven percent, and a black registered voter percentage of fifty-four percent in

the remedy's Fifth District does not result in a dilution of the rights of that district's minorities. Dr. Katz, the most credible statistical expert at the first trial, identified a "significant majority" minority district as one having fifty-five to sixty percent of black registered voters. *See* Katz Rep. at 22. We endeavored to maintain the black percentage of registered voters in the Fifth District as close to fifty-five percent as possible. Expert testimony at the Eleventh District trial indicated a significant drop in the probability of a black candidate being elected as the black percentage of registered voters declines to fifty percent. Katz Rep. at tab 5. The probability of electing a black candidate is below fifty percent when the percentage of black registered voters equals fifty percent. *Id.* Therefore, maintaining the percentage of black registered voters as close to fifty-five percent as possible was necessary, in our view, to avoid dilution of the Fifth District minorities' rights.[18]

The minority population of the Fifth District in the 1982 plan was sixty-five percent in order for Georgia to comply with the VRA. *Busbee, supra.* We felt that allowing the minority population to fall below sixty percent might be viewed as dilutive at some level. The minority population in the remedy's Fifth District is just shy of sixty-two percent.[19]

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[18] While we noted flaws in these analyses in *Johnson* I, these provide the most probative analyses we have which indicate what might be dilutive in the Fifth District. These statistics are based on statewide figures, though. The Court hesitates to rely on statistical data using percentages of black *registered* voters as its basis since that in essence condones voter apathy.

[19] We believe minority voting age population is the appropriate measure for dilution analysis. We offer minority population percentages strictly for comparison purposes since that is what the *Busbee* court focused on in essentially forcing Georgia to create a Fifth District in 1982 with a minority population of 65%.

2) Section 5

VRA Section 5 requires certain states which have a history of discriminating against minorities to seek preclearance from the U.S. Attorney General prior to implementing a new districting or apportionment plan. 42 U.S.C. § 1973c. However, "[a] decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act." *Connor v. Johnson,* 402 U.S. 690, 691 (1971); *McDaniel v. Sanchez,* 452 U.S. 130, 138 (1981). Thus, this Court is not required to seek the preclearance of the Attorney General prior to implementing its plan. The Court does note that its remedy is not retrogressive to the rights of minorities when compared to the 1982 plan,[20] and it does not violate Section 5 for the same primary reasons that it does not violate Section 2.

Connor notwithstanding, some court-ordered plans have been subject to Section 5 and its requirements. In

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[20] Debate arose at the August, 1995 hearing and the October, 1995 trial as to whether the current plan or the 1982 plan is the appropriate benchmark for retrogression analysis. Interestingly, the DOJ asserted that the unconstitutional plan should be used, contravening 28 C.F.R. § 51.54(b)(1) which dictates using the last constitutional plan on the ground if the current plan is unconstitutional. Since the Court is in the position of replicating the legislative task as it existed in 1992, the 1982 plan should serve as a guide. Of course, since the Court's plan is not subject to Section 5 preclearance, the point is academic.

Sanchez, the Supreme Court held that Section 5's preclearance requirement did apply to a reapportionment plan submitted to a federal court by the legislative body of a jurisdiction covered by Section 5. 452 U.S. at 153.

It could be argued that the Court's remedy is a legislative plan since it resembles some of the legislative plans, including the unconstitutional one. To varying extents we relied upon the three enacted 1992 plans, as well as the 1972 and 1982 plans, to determine how the legislature maintains district cores and communities of interest, so some similarity to those plans is inevitable.

However, the Court's plan is its own. While it may resemble one or more of several plans presented to us, as a member of this Court observed during the remedy phase of the hearings: "There could come a time when even the fertility of Herschel the [reapportionment] computer is exhausted and we have received a finite number of maps. . . . If we extend that logic we are going to be rubber stamping somebody's plan, but I suspect that what we'll do will be our own unique product." Second Trl. Trans. at 409.

So the remedy we now order is not the product of Georgia's legislature. We of course would have preferred for the legislature to have fulfilled its obligation and formulated a districting plan for Georgia. Alas, none was presented to us.[21] We therefore have formulated our remedy in adherence to constitutional norms and deference

[21] Some members of the General Assembly did present plans to the Court, but none purported to be the actual product of the General Assembly. Nevertheless we considered them along with the other plans presented to us during this process.

to the legislature's historical preferences. Therefore, it is not subject to preclearance under VRA Section 5.

III. Conclusion

The Court has fashioned a plan to remedy Georgia's current, unconstitutional districting plan. In arriving at this remedy, we adhered as closely as possible to the Supreme Court's mandate in *Johnson* II, the principle of one person-one vote, and Georgia's traditional legislative goals and traditions. Adopting a remedy that would be truly minimally disruptive to Georgia's current plan was not an option. No plan of congressional redistricting created by court or legislature will achieve perfection. There are too many practical, political, and altogether human features in the equation. We do no harm with this plan, which cures the unconstitutionality of the former and can serve in "caretaker" status until the legislature convenes to change it. That may occur following the millennium census, or before.

Noting again the reluctance with which the task was undertaken, it is hereby **ORDERED** and **DECREED** that henceforth all elections for the members of the House of Representatives of the Congress of the United States from the State of Georgia shall be conducted in accordance with the plan which is appended hereto as Appendices "A" and "B".

SO ORDERED, this 13th day of December, 1995.

/s/ B. Avant Edenfield
B. AVANT EDENFIELD,
CHIEF JUDGE
UNITED STATES DISTRICT
COURT
SOUTHERN DISTRICT
OF GEORGIA

/s/ Dudley H. Bowen, Jr.
DUDLEY H. BOWEN, JR.
UNITED STATES DISTRICT
COURT
SOUTHERN DISTRICT
OF GEORGIA

Johnson, et al. v. Miller, et al., No. CV 194-008 (S.D. Ga.) (three-judge court)

EDMONDSON, Circuit Judge, dissents. JLE

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Block Group:3
Block Group:4
Block Group:5
Block Group:6
Block Group:7
Block Group:8
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Tract:0311.06
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Block Group:5
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Block Group:5
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Tract:0315.02
Tract:0316.97

DOUGLAS
FLOYD
HARALSON
HEARD
PAULDING
POLK
TROUP

District No. 8

APPLING
ATKINSON
BACON
BEN HILL
BERRIEN
BIBB
BLECKLEY
CHARLTON
CLINCH
COFFEE
CRAWFORD
DODGE
DOOLY
ECHOLS
HOUSTON
IRWIN
JEFF DAVIS
LAMAR
LANIER
MONROE
MONTGOMERY
PEACH
PULASKI
TELFAIR
TREUTLEN
TWIGGS
UPSON
WARE

WHEELER
WILCOX

District No. 9

CATOOSA
CHEROKEE
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Tract:0903.
Tract:0904.
Tract:0905.
Tract:0906.
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Block Group:3
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DADE
DAWSON
FANNIN
FORSYTH
GILMER
GORDON
HABERSHAM
HALL
LUMPKIN
MURRAY
PICKENS

RABUN
STEPHENS
TOWNS
UNION
WALKER
WHITE
WHITFIELD

District No. 10

BALDWIN
BURKE
BUTTS
COLUMBIA
ELBERT
EMANUEL
GLASCOCK
GREENE
HANCOCK
JASPER
JEFFERSON
JOHNSON
JONES
LAURENS
LINCOLN
MCDUFFIE
OGLETHORPE
PUTNAM
RICHMOND
TALIAFERRO
WARREN
WASHINGTON
WILKES
WILKINSON

District No. 11

BANKS
BARROW
CLARKE

FRANKLIN
GWINNETT
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Block Group:2
Block Group:3
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Block Group:5
Block Group:6
Block Group:7

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Block Group:5
Block Group:6
Block Group:7
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Tract:0504.13
Tract:0504.14
Tract:0504.15
Tract:0504.16
Tract:0505.02
Block: 134A, 134B
Tract:0505.03
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That part of Block 117 which lies south and east of Taylor Road
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Block Group:8

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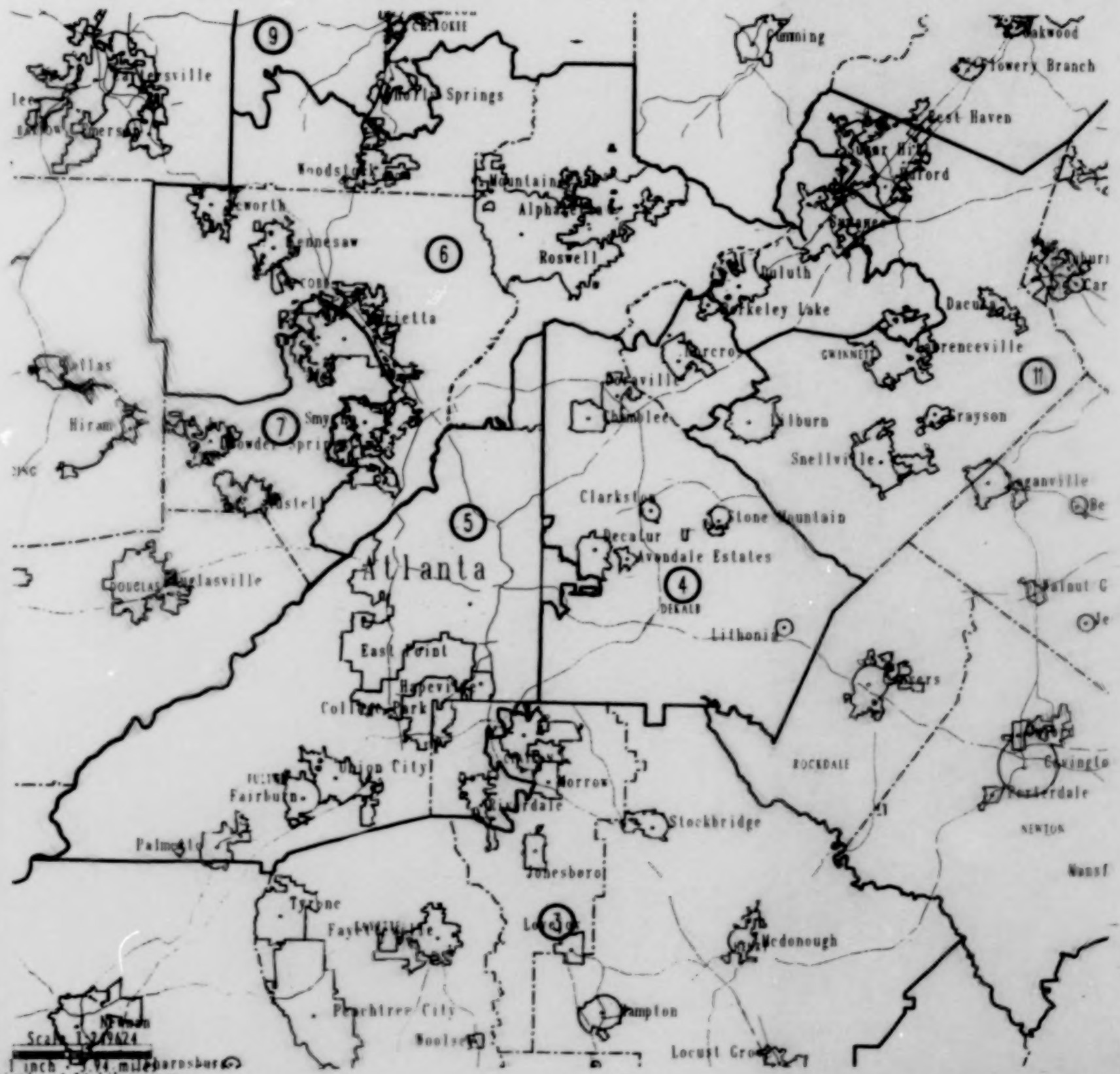
Tract:0507.04
Tract:0507.05
Tract:0507.06
Tract:0507.07
Tract:0507.08
Tract:0507.09
Tract:0507.10
Tract:0507.11
HART
JACKSON
MADISON
MORGAN
NEWTON
OCONEE
ROCKDALE
WALTON

(NOTE: VAP = Voting Age Population)

District Number	Total Pop % Deviaton	Black Pop % of Total	VAP % of Total	Black VAP % of VAP
1	588541	179809	426558	118631
	-0.07	30.55	72.40	27.81
2	587503	230419	415407	145948
	-0.23	39.21	70.70	35.13
3	589630	145377	424974	95713
	0.12	24.66	73.07	22.52
4	589322	215700	450500	147784
	0.07	36.60	76.44	32.00
5	589359	365330	442885	253212
	0.07	61.99	75.15	57.17
6	589600	37597	440475	27122
	0.11	6.38	74.71	6.16
7	589405	77871	432603	51911
	0.08	13.21	73.41	12.00
8	587912	182636	425122	120107
	-0.17	31.07	72.31	28.25
9	589420	21520	439083	15164
	0.08	3.65	74.49	3.45
10	588046	220803	423299	145950
	-0.15	37.55	71.98	34.48
11	589398	69503	429927	46600
	0.08	11.79	72.94	10.84
Totals	6478216	1746565	4750913	1168142

Number of Districts	:	11		
Members Per District	:	1		
Ideal District Size	:	588929		
Average Deviation (%)	:	0.11		
Deviation Range (%)	:	-0.23	to	0.12
Overall Deviation (%)	:	0.35		

(DATA SOURCE: 1990 US Census PL94-171 Population Counts)
(NOTE: Districts numbered >200 are used as special accumulators.)
(They are not included in avg or % range calculations.)



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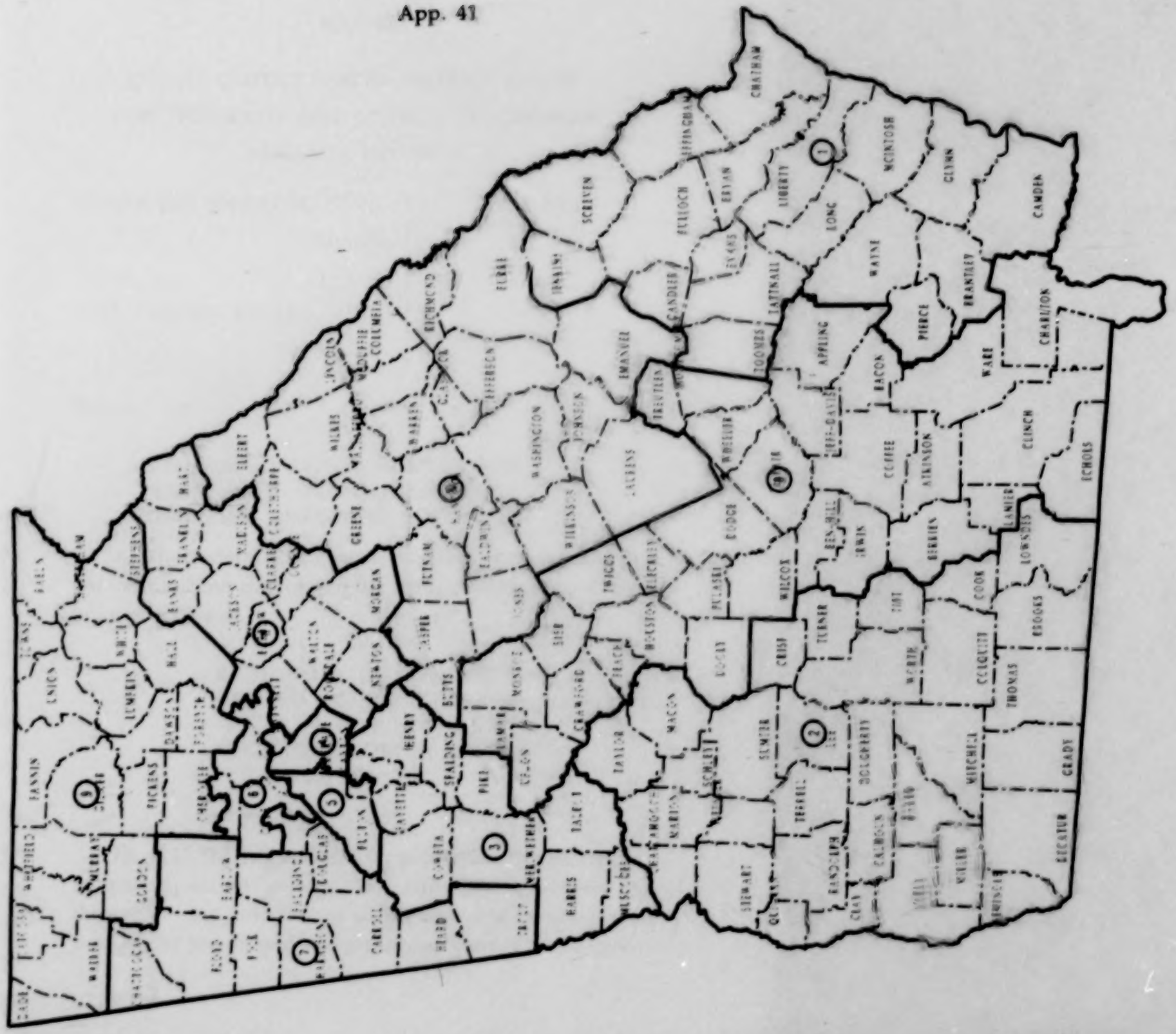
CHATHAM
SCREVEN
EFFINGHAM
EVANS
LIBERTY
MCINTOSH
GLYNN
CAMDEN
LONG
WAYNE
BRYAN
BULLOCH
TATTNALL
TOOMBS
APPLING
PIERCE
BRANTLEY
CHARLTON
WARE
BACON
CLINCH
ECHOLS
LANIER
BERRIEN
COFFEE
ATKINSON
JEFF DAVIS
TELFAIR
WILCOX
DODGE
TURNER
WORTH
COOK
BROOKS
THOMAS
COLQUITT
GRADY
DECATUR
SEMINOLE
MILLER
MITCHELL
BAKER
CALHOUN
EARLY
RANDOLPH
TERRELL
DOUGHERTY
LEE
SUMTER
WEBSTER
STEWART
QUITMAN
CLAY
CALHOUN
GORDON
WILKINSON
JOHNSON
EMANUEL
JEFFERSON
RICHMOND
BURKE
JENKINS
TREUTLEN
WHEELER
TELFAIR
WILCOX
DODGE
BLECKLEY
PULASKI
CRISP
DOOLY
WILCOX
TURNER
WORTH
COOK
BROOKS
LOWNDES
BERRIEN
LANIER
ECHOLS
CLINCH
WARE
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EVANS
BRYAN
LIBERTY
BULLOCH
TATTNALL
TOOMBS
APPLING
BACON
JEFF DAVIS
COFFEE
ATKINSON

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

DIVIDA [sic] JOHNSON, ET AL., Plaintiffs vs. ZELL MILLER, ET AL., Defendants.	FILE NO. CV194-008

Before:

Honorable JAMES L. EDMONDSON
Honorable B. AVANT EDENFIELD
Honorable DUDLEY H. BOWEN, JR.

At The Federal Courthouse Building, Augusta, Georgia, on the 22nd day of August 1995, commencing at the hour of 9:00 a.m.

RICHARD A. DUERINGER,
CERTIFIED COURT REPORTER
P. O. BOX 2106
AUGUSTA, GEORGIA 30903
(706) 790-6212

* * *

[p. 111] The Abrams intervenors will not participate in that stipulation process. Nor will they participate in the evidentiary proceedings on the matter of the constitutionality of the Second Congressional District of Georgia.

It is our view that there is no need for intervenors in this litigation. The record is that the State of Georgia and its elected officials will defend the congressional districts that were enacted by the legislature to the full extent of the law. We [p. 112] have seen that and we expect that they will do that again and therefore we see no need to have intervenors.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

DAVIDA JOHNSON; PAM BURKE; HENRY ZITTROUER; GEORGE L. DELOACH; and GEORGE SEATON,	)	CV 194-008
Plaintiffs,	)	
v.	)	
ZELL MILLER, in his official capacity as Governor of the State of Georgia; et al.,	)	
Defendants.	)	

Before EDMONDSON, Circuit Judge; EDENFIELD, Chief Judge; and BOWEN, District Judge.

ORDER

(Filed Jan. 8, 1996)

The Abrams Intervenors filed a Motion for Hearing and Reconsideration asking this Court to reconsider the imposition of our remedy. After careful consideration, the Intervenors' motion is **DENIED**.

SO ORDERED, this 8th day of January, 1996.

/s/ J. L. Edmondson
J. L. EDMONDSON,
CIRCUIT JUDGE
UNITED STATES ELEVENTH
CIRCUIT COURT OF APPEALS

/s/ B. Avant Edenfield
B. AVANT EDENFIELD,
CHIEF JUDGE
UNITED STATES DISTRICT
COURT SOUTHERN DISTRICT
OF GEORGIA

/s/ Dudley H. Bowen, Jr.
DUDLEY H. BOWEN, JR.
UNITED STATES DISTRICT
COURT SOUTHERN DISTRICT
OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

DAVIDA JOHNSON; PAM BURKE; HENRY ZITTROUER; GEORGE L. DELOACH; and GEORGE SEATON,

Plaintiffs,

v.

ZELL MILLER, in his official capacity as Governor of the State of Georgia; PIERRE HOWARD, in his official capacity as Lieutenant Governor of the State of Georgia and President of the Georgia Senate; THOMAS MURPHY, in his official capacity as Speaker of the Georgia House of Representatives; and MAX CLELAND, in his official capacity as Secretary of State of the State of Georgia,

Defendants,

and

LUCIOUS ABRAMS, JR.; REV. G. L. AVERY; WILLIAM GARY CHAMBERS, SR.; and KAREN WATSON,

Defendant-Intervenors,

UNITED STATES OF AMERICA,

Defendant-Intervenor.

Civil Action No.
CV 194-008

NOTICE OF APPEAL

(Filed Jan. 11, 1996)

Notice is hereby given that Lucious Abrams, Jr., Rev. G. L. Avery, William Gary Chambers, Sr., and Karen Watson, Defendant Intervenors in the above named case, hereby appeal to the Supreme Court of the United States pursuant to 28 U.S.C. § 1253 from the Order of the three judge court implementing a court ordered redistricting plan for Georgia's congressional districts entered in this action on December 13, 1995, the Order of the Court entered on August 22, 1995, denying intervention to defend the constitutionality of Georgia's Second Congressional District, and the Order of the Court entered on January 8, 1995 denying their motion for hearing and reconsideration.

Respectfully submitted,

/s/ Laughlin McDonald
LAUGHLIN McDONALD
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NEIL BRADLEY
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GERALD R. WEBER
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of Georgia
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Atlanta, Georgia 30303
(404) 523-6201

Attorneys for Defendant-Intervenors

Article 1, Section 2, Clause 3

Section 2, Clause 3. Apportionment of Representatives and Taxes

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

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42 U.S.C. § 1973.

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

---

42 U.S.C. § 1973c.

Whenever a State or political subdivision with respect to which the prohibitions set forth in section

1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting, different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*,

That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.